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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 837

DAVE RICE and HARRY HARPER,

Petitioners,

vs.

RINGSBY TRUCK LINES and LAWRENCE HOWARD CASH individually and d/b/a RINGSBY TRUCK LINES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause.

OPINION BELOW.

The opinion of the Court of Appeals, one justice dissenting, is dated October 14, 1963. Petition for rehearing was denied on November 19, 1963. The opinion, reported in 324 F. 2d 146, is quoted in full in the appendix hereto.

JURISDICTION.

Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. In a diversity case, may the federal courts ignore or refuse to follow applicable state law as required under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64?

2. May the plaintiffs, who received jury verdicts in a personal and property injuries suit, be deprived of the jury determination by judicial fiat and refusal to follow applicable state law?

STATEMENT

This was an action commenced in the United States District Court, Northern District of Illinois, Eastern Division to recover damages occasioned by the alleged negligence of the defendants in the operation of their motor truck on an Illinois public highway. The district court dismissed the complaint as to Rice under the theory that a certain action and result in the circuit court of Rock Island County, Illinois, to which Rice was not a party, barred his federal action under the "Doctrine of Estoppel By Verdict." On appeal to the Seventh Circuit, the Court of Appeals reversed and remanded the cause for trial holding that Rice was "entitled to his day in court" and observing, inter alia:

> "The rights of a seriously injured truck driver are at stake." (302 F. 2d at 552)

Pursuant to the mandate of the Court of Appeals, a trial was held and the jury rendered a verdict for Rice and Harper, the plaintiffs. The jury assessed Rice's damages for his personal injuries at $40,000.00 and Harper's property damage to his truck at $6,000.00.

The district court granted the motion of defendants for judgment notwithstanding the verdict and entered judgment in favor of the defendants.

On a second appeal challenging the propriety of judgment n.o.v. and the failure of the District Judge(*) to

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(*) The presiding judge at the trial was the Honorable George H. Boldt, visiting Judge from the Western District of the State of Washington.

follow applicable Illinois law, the Court of Appeals affirmed.

The recitation of the facts and circumstances of the occurrence are adequately stated in the majority opinion below (appendix hereto). Without citing any cases, however, as to the law of Illinois or any other jurisdiction, the majority concluded that "the granting of judgment n.o.v. for defendants in this case was fully justified on two grounds, first there was the lack of evidence to show negligence on the part of the driver Cash, and second, because under Illinois law, plaintiffs were guilty of contributory negligence as a matter of law."

In dissenting, Justice Kiley, pointed out that:

> "In deciding whether there is any evidence to entitle plaintiffs to a jury trial [sic] in this diversity case governed by Illinois law, this court should consider *only* the evidence favorable to plaintiffs, draw inferences most strongly in their favor and disregard contradictory and contrary evidence. *Osborne* v. *Leuffgren*, 381 Ill. 295, 45 N.E. 2d 622 (1942); *Hunter* v. *Troup*, 315 Ill. 293, 146 N.E. 321 (1924); *Kirluck* v. *Cohn*, 16 Ill. App. 2d 385, 148 N.E. 2d 605 (1958)." (Court's emphasis)

REASONS FOR GRANTING THE WRIT.

In limine, petitioners are not unmindful of the strictures and policy of this court as expressed in *United States* v. *Johnston*, 268 U.S. 220, at p. 227: "We do not grant certiorari to review evidence and discuss specific facts."

While nominally the instant case is one for personal injuries and property damages arising out of a highway accident and was resolved purely as a question of fact by the jury in favor of the plaintiffs, the case acquires special importance, transcending the interest of the immediate litigants. This is because, as the minority opinion points out, the majority refused to apply Illinois law (Illinois being both the forum and the place of the accident) as it was required to do under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.(*)

Since federal courts are bound by decisions of a state's intermediate appellate courts as well as the state's highest reviewing court, the refusal or failure of the district and circuit courts to follow the state decisions has been deemed sufficient cause for review by this court. *Six Companies* v. *Highway District*, 311 U.S. 180; *West* v. *American T & T Co.*, 311 U.S. 223; *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464.

Moreover, this Court has in numerous instances granted certiorari where a jury verdict for the plaintiff has been

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(*) See also: *Russell* v. *Todd*, 309 U.S. 280; *Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103; *Guaranty Trust Company* v. *York*, 326 U.S. 99.

set aside by judicial fiat and the plaintiff deprived of his rights to a jury decision on factual issues. Especially motivated by the "importance of preserving for litigants • • • their right to a jury trial • • •" (*Wilkerson* v. *McCarthy*, 336 U.S. 53, 55, an F.E.L.A. case), this court has not only granted certiorari in such cases but has also restored jury verdicts.

The observations of Mr. Justice Douglas in his concurring opinion in the *Wilkerson* case, is pertinent to the problem of the instant case:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury functioned in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." (336 U.S. at 70-71)

As the dissent in the instant case tersely but sharply points out, the jury function was not respected in the instant case because the majority either misapprehended or refused to follow Illinois law governing judgments n.o.v. These principles are pointedly and correctly summarized in *May* v. *Columbian Rope Co.*, 40 Ill. App. 2d 264, 189 N.E. 2d 394 at 398, as follows:

> "On appeal from judgment notwithstanding the verdict, we are concerned only with the *narrow question* whether there is any evidence in its aspect most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, which would tend to prove the material elements of the plaintiff's case. In so doing we may not consider the credibility of the testimony or test the preponderance of the evidence. *Proof unfavorable to the plaintiff cannot be considered.* The above rules apply, 'even though upon the entire record the evidence may preponderate against the party in opposition to such motion (for judgment,

notwithstanding the verdict) so that a verdict in his favor could not stand when tested by a judgment for a new trial.'

"With the foregoing rules in mind, it is clear that in reviewing the propriety of judgment notwithstanding the verdict, we cannot cast in the question of truth of plaintiff's testimony or that of his corroborating deponent * * * these were preeminently questions of fact for the jury determination." (Emphasis added)

In *Jaffray* v. *Hill*, 41 Ill. App. 2d 460, 191 N.E. 2d 399, the court again summarized Illinois doctrine:

"A motion for judgment n.o.v. presents a single question—whether there is *any* evidence in the record, which, standing alone, and taken with all intendments *most favorable to the party resisting the motion*, tends to prove the material elements of this case." (Court's emphasis)

Where Illinois law was applicable in prior cases, the Court of Appeals has observed and applied these principles. *Weilack* v. *Rogers Cartage Co.*, 290 F. 2d 235; *Valdes* v. *Karroll's, Inc.*, 277 F. 2d 637; *Willits* v. *Yellow Cab Co.*, 214 F. 2d 612.

It is apparent that the Court of Appeals misapprehended the Illinois doctrine when it stated:

"It is fundamental that a trial court should overrule a motion for judgment notwithstanding the verdict if, on an examination of the record, there is any evidence which *fairly tends to prove* the necessary elements of the plaintiff's case." (Emphasis added)

The phrase "fairly tends to prove" is not, under the Illinois law, a proper test for the propriety of judgment n.o.v. The word "fairly" used in connection with proof, denotes that the evidence must be "clear, satisfactory and convincing" (see *E. Smith & Co.* v. *Kimball*, S.D. 162 N.W.

162, 163) whereas under Illinois law the narrow issue is whether there is "*any* evidence".

It is quite plain from several points in its opinion that the majority arrived at its conclusion by mentioning only the evidence *favorable to the defendants*, disputed by plaintiffs, and which were resolved by the jury in favor of plaintiffs.(*)

It is plain that the majority misapprehends Illinois law in another right or respect. Thus the majority opinion states that it agrees with the trial judge who said, "* * * it is clear from this evidence that Rice could not have stopped the Harper truck in a much greater distance than that which was available to him here'". This, apparently,

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(*)—"Defendant Cash described the shoulder as soft." (App. 2a) Defendant's description of the shoulder favorable to him, may not be considered on the judgment n.o.v.

—"Visibility of objects was limited to 200 feet, although light from a vehicle could be seen somewhat further." (App. 3a) This again is Cash's version, but is disputed by plaintiff's testimony that his visibility in the direction of the bridge was about 50 to 75 feet. (A. 13).

—"The Ringsby unit had been inspected at the Chicago Terminal before it was turned over to Cash and he likewise checked it and found the lighting equipment on the vehicle to be in working order." (App. 3a) This again is merely the defendant's version as to the state of his equipment, whereas the only evidence which the Court could properly consider was Rice's statement that the Cash rear lights were *not* visible to him. (A. 25)

—"He (Rice) * * * did not see the Ringsby unit *or its lights*, until he was within 50 or 75 feet of it." (App. 4a) The court assumes that the lights were in fact showing, whereas it may only consider Rice's claim that he saw reflectors, not lights.

is the crux of the court's decision, and without explicitly referring to the "range of vision rule" applies the range of vision rule to the instant facts. The so-called "range of vision rule" is not the law of Illinois, neither by statute nor common law decisions, and has been repeatedly rejected in factual situations as close as that of the instant case. Cf *Budds* v. *Keeshin Motors Express Co.*, 326 Ill. App. 59; 61 N.E. 2d 579; *Warnes* v. *Champaign County Seat Co.*, 5 Ill. App. 2d 151; 124 N.E. 2d 695; *Moffitt* v. *O.L.D. Forwarding Co.*, 331 Ill. App. 278; 73 N.E. 2d 164.

In all of these aforementioned Illinois cases, it is a firmly founded principle that whether or not a party is negligent in not being able to stop within the distance that he can see is a question for the jury not for the court.

CONCLUSION

This Court said, in *Dimick* v. *Schiedt*, 293 U.S. 474, at 486:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Petitioners of course do not challenge the commonplace power and duty of a court to enter judgment n.o.v. *in a proper case*. Where, however, the court substitutes its judgment and inferences from the facts for that of the jury in plain disregard of state law governing the propriety of judgments n.o.v., then serious questions under the

Seventh Amendment pertaining to right of jury trial and of due process arise which merit the scrutiny of this Court.

Wherefore petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14100 September Term and Session, 1963

October 14, 1963

Rehearing denied November 19, 1963

Before HASTINGS, *Chief Judge*, DUFFY and KILEY, *Circuit Judges*.

DUFFY, *Circuit Judge*. This controversy was before us on a previous occasion, 302 F.2d 550. The District Court had held that although Rice was not a party to an action in the Circuit Court in Rock Island County, Illinois, his negligence was there litigated, and that the instant suit was barred by the "Doctrine of Estoppel by Verdict." We held that Rice was entitled to his day in court. We reversed and remanded the case for trial.

Pursuant to the mandate, a trial was held. The jury found in favor of plaintiff Rice, assessing damages for his personal injuries at $40,000. The jury also awarded $6,000 to plaintiff Harper for damages to his truck.

The trial judge reserved his ruling on defendants' motions for a directed verdict and to dismiss at the close of plaintiffs' evidence. He denied similar motions at the close of all the evidence. Thereafter, the Court entered judgment n.o.v. for the defendants.

(Opinion)

On April 18, 1957, Rice was driving a 1956 Diamond T tractor pulling a semi-trailer in a westerly direction on Highway 22 in Bureau County, Illinois. The trailer was owned by plaintiff Harper and was being driven from Chicago to Iowa.

At the same time and on the same highway and also proceeding in a westerly direction and ahead of the Harper unit, was a tractor-trailer unit owned by defendant Ringsby Truck Lines and driven by defendant Cash, its employee.

A collision involving plaintiff Harper's tractor-trailer driven by Rice occurred between 5 and 5:30 a.m. The highway was of concrete construction, the paved surface having a width of eighteen feet and consisting of two lanes of travel. At the time of the collision, the Ringsby unit driven by Cash had stopped at a point just east of a bridge over the Green River. The width of the bridge was twenty-one and a half feet at the inside of the steel beam construction. The bridge was about seventy-five feet in length.

The highway, both east and west of the bridge, was straight and level for a distance of about half a mile. After that point to the west of the bridge there was a slight rise with possibly a fifteen percent incline. At the easterly approach to the bridge there was a shoulder on the northside of the highway. Defendant Cash described the shoulder as soft.

The trailer driven by Rice was loaded at Chicago. When he reached a small town named Walnut, he stopped and met Harry Harper. They had coffee and visited there for

some time. Then Rice resumed his trip west. The weather was damp, foggy and getting heavier. A general foggy condition prevailed in the area, but it was heavier near the bridge. Visibility of objects was limited to two hundred feet although a light from a vehicle could be seen somewhat further.

The Ringsby unit had been inspected at the Chicago terminal before it was turned over to Cash and he likewise checked it and found the lighting equipment on the vehicle to be in working order. A few miles east of the Green River bridge he stopped at a railroad crossing for a train to pass. While waiting, he got out of his cab, walked around the unit and checked the lights and tires.

Plaintiff Rice was familiar with the highway where the accident occurred. He had driven on this highway some fifty times during the previous year.

As the defendant Cash, driving the Ringsby unit, approached the Green River bridge, he observed the lights of another vehicle approaching him from the west. This was a tractor-trailer unit belonging to General Express-ways, and was driven by one Moffett. Moffett had observed the lights on the Ringsby unit, and he flashed his lights as a signal that he was closer to the bridge than Cash, and was going to drive across. Cash observed the signal and slowed down in order to let the other unit cross the bridge. Cash came to a stop about five feet from the east end of the bridge.

Plaintiff Rice, driving the Harper unit, was some distance to the rear of the Ringsby unit. He failed to see the lights from the unit driven by Moffett and, in fact, did

not see the Ringsby unit or its lights until he was within fifty or seventy-five feet of it. Rice claimed he did not see the brake lights on the Ringsby unit but saw only the reflectors.

Rice was unable to stop his unit short of the Ringsby trailer so he turned his vehicle to his left and into the eastbound lane, colliding with two tractor-trailer units which were being driven in that lane in an easterly direction.

It is fundamental that a trial court should overrule a motion for a judgment notwithstanding the verdict if, upon an examination of the record, there is any evidence which fairly tends to prove the necessary elements of the plaintiff's case. However, it is also the rule that when the evidence is considered in its aspect most favorable to the plaintiff, and there is a total failure to prove any necessary element of the cause, the motion for judgment notwithstanding the verdict should be sustained.

In comments from the bench, the District Judge gave a vivid description of the situation immediately before and at the time of the collision. He said (App. 148): "In this instance, all of the vehicles involved were big, heavy, behemoths—wide, heavy trucks; all of the drivers involved were long experienced truck drivers, and every truck driver involved said he was familiar with the custom and the practice among truck drivers of giving precedence, over narrow bridges under restricted visibility, to the vehicle signalling and being closest to the bridge."

The trial court further stated (App. 149): "When two vehicles, each eight feet wide, are going down a highway

about eighteen feet wide, leaving only two or three feet of clearance on all sides, approaching a bridge only just very slightly wider than that, in a dense fog bank, in the utter darkness, it seems to me that prudence would require that they either come down to a very, very slow rate of speed in approaching the bridge under those conditions, or that one or the other yield to the other vehicle going across."

Plaintiff Rice knew or is charged with knowing that other trucks would be operating on that highway in spite of fog conditions. He knew he was approaching the vicinity of the narrow bridge over the Green River. He first testified that his speed was 35 to 40 miles per hour, but later said it was 25 to 30 miles per hour. In any event, we agree with the trial judge who said ". . . it is clear from this evidence that Rice could not have stopped the Harper truck in a much greater distance than that which was available to him here."

It is clear from an examination of the record before us that plaintiffs have failed to adduce any evidence tending to show defendants were guilty of any negligence which was the proximate cause of the collision.

The trial court gave long and careful consideration to the question of contributory negligence. The Court said (App. 145): "I have weighed it very heavily since the trial, trying to find some escape from my own deep conviction that no fair and reasonably minded person could say that this gross, inexcusable negligence of a trained, experienced vehicle driver could be found either not negligence under the circumstances, or that such negligence was not

a proximate cause of the injury for which plaintiff seeks recovery."

We hold the granting of judgment n.o.v. for defendants in this case was fully justified on two grounds, first, there was the lack of evidence to show negligence on the part of the driver Cash, and second, because under Illinois law, plaintiffs were guilty of contributory negligence as a matter of law.

Affirmed.

KILEY, *Circuit Judge*, dissenting. I dissent.

In deciding whether there is any evidence to entitle plaintiffs to a jury trial in this diversity case governed by Illinois law, this court should consider *only* the evidence favorable to plaintiffs, draw inferences most strongly in their favor and disregard contradictory and contrary evidence. *Osborn* v. *Leuffgen*, 381 Ill. 295, 45 N.E. 2d 622 (1942), *Hunter* v. *Troup*, 315 Ill. 293, 146 N.E. 321 (1924), *Kiriluk* v. *Cohn*, 16 Ill. App. 2d 385, 148 N.E. 2d 607 (1958).

Under this rule the record justifies in plaintiffs' favor the following evidence and inferences: that Rice was driving Harper's truck in the fog at twenty-five miles per hour on a two-lane highway; that he saw no lights ahead of him until, when fifty feet away, he saw, in the glare of his own headlights, the reflector lights on the Ringsby truck whose brake lights were not working and had not warned him the truck had stopped; that he immediately applied his brakes, which prior to the trip had been checked as safe; and that unable to avoid collision he turned into the lefthand lane and collided with two oncoming trucks whose lights he had not seen in the fog.

(Opinion)

On this evidence *only*, in my opinion, reasonable men could differ as to whether plaintiffs or Cash were or were not guilty of negligence proximately causing the collision.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October 14, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the Opinion of this Court filed this day.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

November 19, 1963

It Is Hereby Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, together with the dissenting opinion (App. A of Ptn.) is reported in 324 F. 2d 146.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

It is respectfully suggested that there is nothing in the record, nor in the opinion of the Court of Appeals, 324 F. 2d 146, or in the bench opinion delivered by the District Court (App. 138-150), on which the purported questions presented by the plaintiffs could be predicated.

STATEMENTS

The plaintiffs' statement, it is believed, is sufficient insofar as it sets forth the history and outcome of the litigation. It is stated that the recitation of the facts and circumstances of the occurrence are adequately stated in the majority opinion. While the record is somewhat lengthy and much testimony was taken, the plaintiffs have not pointed to any fact or circumstance shown which it is contended that the court overlooked or misapprehended which would have required or justified the court in arriving at any conclusion other than that handed down in its decision.

ARGUMENT.

I.

The Judgment of the Court of Appeals Is Clearly Correct.

The trial court found that the plaintiffs not only failed to prove the exercise of ordinary care on their part for the safety of their respective person and property, but that the evidence adduced could lead to no other conclusion than that the plaintiffs were guilty of contributory negligence as a matter of law which was a proximate cause of the occurrence complained of (App. 145-146). With this finding the Court of Appeals agreed.

The trial court also found that the plaintiffs failed to adduce any evidence tending to prove negligence on the part of the defendants, which was a proximate cause of the occurrence (App. 148), and with this finding the Court of Appeals, also, agreed.

The plaintiffs have not, in their petition, pointed to any evidence tending to prove the exercise of ordinary care on their part or of any negligence on the part of the defendants. The only suggestion that there was any such evidence is made by way of a footnote on page 8 of the Petition, in which it is asserted that, while the evidence shows that, at the time, visibility was limited to 200 feet, Rice testified that it was limited to 50 to 75 feet, and that, according to Rice, he did not see the Ringsby vehicle until he was within 50 or 75 feet of it, at which time he saw its reflectors and not its lights. It could not be said that Rice's testimony with respect to either of these matters tended to prove that he was in the exercise of ordinary care. According to Rice he was operating his vehicle with headlights on

low (App. 13), which would obviously restrict his range of vision. If the range of visibility of objects were the controlling factor, which, of course, it is not, the testimony of Rice that he did not see the Ringsby unit until he was within 50 or 75 feet of it, would tend to prove only that he was not in the exercise of ordinary care.

II.

The Court of Appeals Followed the Applicable Law of Illinois.

The plaintiffs' assumption, in the first of their questions presented, that the Court of Appeals ignored or refused to follow the applicable law of Illinois as required under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, raises merely a false issue.

The *Erie* case was decided in 1938. The rule of decision announced in that case has been reaffirmed by this Court on many occasions. It is now familiar law and has been consistently followed by the Court of Appeals for the Seventh Circuit. See cases cited in the petition on page 7. In *Koch* v. *Chicago & N. W. Ry. Co.*, 7 Cir., 208 F. 2d 152, in which the same question arose, the Court stated at page 154:

> "Since federal jurisdiction in this case arises by reason of the diverse citizenship of the parties, the law of Illinois is controlling. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. The law is well settled in Illinois that one cannot expose himself to danger which he might have avoided through the exercise of reasonable care for his own safety and then recover damages for a resulting injury." (Citing Illinois cases.)

Furthermore the Seventh Circuit has always been zealous in its adherence to this rule. In *Hawkeye-Security Ins. Co.* v. *Presbitero & Sons*, 209 F. 2d 281, the Court stated at page 283:

> "Whether the law of other states is in accord with

this decision or whether, if the question were open to us, we would decide otherwise is beyond the point; we are bound by the Illinois law."

The Court of Appeals did not ignore or refuse to follow the applicable State law in the instant case.

Criticism of the opinion of the Court of Appeals is directed principally to the following statement:

> "It is fundamental that a trial court should overrule a motion for judgment notwithstanding the verdict if, on an examination of the record, there is any evidence which *fairly tends to prove* the necessary elements of the plaintiff's case." (Ptn. 7.)

The criticism, however, is without merit. The plaintiffs attempt to lift the word "fairly" from its context and give to it a meaning that it might have in some other or different context. The word has been used similarly on many occasions by the Courts of Illinois in stating the rule. In *Hunter* v. *Troup*, 315 Ill. 293, 146 N. E. 321, in considering the propriety of a directed verdict, the Supreme Court at page 296, stated the rule thus:

> "The question presented on such motion is whether there is any evidence *fairly tending to prove* the plaintiff's declaration." (Emphasis ours.)

In *Thompson* v. *Fidelity & Casualty Co.*, 16 Ill. App. 2d 159, 148 N. E. 2d 9, the Court in reversing a directed verdict for the plaintiff, at page 172, used the following language:

> "In the case before us the plaintiff has failed absolutely to make out a case and there is a complete absence in the record of any evidence *fairly tending to prove* all of the necessary elements of the plaintiff's case. Therefore, the court erred in granting plaintiff's motion for a directed verdict at the close of the evidence." (Emphasis ours.)

The Court of Appeals, therefore, in making this statement, was laying down the law of Illinois in the language used by the Illinois courts.

Furthermore the same rule applies to a motion for judgment notwithstanding the verdict. In *Merlo* v. *Public Service Co.*, 381 Ill. 300, 45 N. E. 2d 665, the Court stated at page 311:

> "The Civil Practice Act and Rule 22 of this court require the court to be governed by the same rules in passing upon a motion for judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The power of the court is the same in both cases, the reason being that the motions are, in effect, the same."

Beginning on page 8 of the petition, the plaintiffs attempt to make it appear that under Illinois law the court, on a motion for judgment notwithstanding the verdict, may not consider evidence in the record favorable to the defendants although undisputed, or the testimony of Rice to the effect that he could not have stopped the Harper unit within the distance he was from the Ringsby unit when he first saw it. Such, of course, is not the law of Illinois. Nor, it is submitted, of any other jurisdiction. Where, as here, evidence was adduced by both sides, the court, on passing on the motion for judgment notwithstanding the verdict, considers the whole of the record. As was stated in the *Thompson* case, above quoted from, at page 172:

> "The question of law presented to the court upon defendant's motion for a directed verdict at the close of all of the evidence is whether, when all of the evidence is considered together with all reasonable inferences from it in its most favorable aspect to the plaintiff, there is a total failure to prove a necessary element of a plaintiff's case. *Nelson* v. *Stutz Chicago Factory Branch, Inc.*, 341 Ill. 387, 193 N. E. 394."

The rule has been stated by the courts of Illinois in many different ways. In *Tucker* v. *N. Y., C. & St. L. R. R. Co.*, 12 Ill. 2d 532, 147 N. E. 2d 376, the Court stated at page 534:

> "The rule of law, to be applied in determining whether the trial court should have directed a verdict for the defendant, is clear. A motion for a directed verdict should be allowed if, when all of the evidence is considered, with all reasonable inferences to be drawn therefrom in its aspects most favorable to the party against whom the motion is directed, there is a total failure to prove one or more essential elements of the case—in the case at bar, the element of due care. *Carrell* v. *New York Central Railroad Co.*, 384 Ill. 599; *Greenwald* v. *Baltimore & Ohio Railroad Co.*, 332 Ill. 637; *Ill. Central Railroad Co.* v. *Oswald*, 338 Ill. 270."

In *Day* v. *Barber-Colman Co.*, 10 Ill. App. 2d 494, 135 N. E. 2d 231, the Court stated at page 502:

> "Upon such motion we can consider only the competent evidence; *Hunter* v. *Troup* (1944), 315 Ill. 293. Evidence that has no probative force, whether objected to or not, cannot be considered: *Knudson* v. *Knudson* (1943), 382 Ill. 492. Evidence sufficient to defeat such a motion must be evidence upon which the jury could, without acting unreasonably in the eyes of the law, decide in favor of the plaintiff: *American Nat. Bank* v. *Woolard* (1930), 342 Ill. 148; *Provenzano* v. *Ill. Cent. R. Co.* (1934), 357 Ill. 192."

In *Sherlin* v. *Jackson*, 5 Ill. 2d 43 at 45, 123 N. E. 2d 895 at 896, the Court stated:

> "The question in such cases is whether there is any evidence in the record tending to prove the allegations of the complaint. The party resisting the motion is entitled to the benefit of all of the evidence favorable to him; but if no evidence was introduced tending to prove the allegations of the complaint, or if only a bare scintilla of evidence has been adduced by the plaintiff, the court should allow the motion. (*Johnson* v. *Bennett*, 395 Ill. 389.)"

As to the quantum of evidence necessary to defeat such a motion, the Court stated in *Knudson* v. *Knudson*, 382 Ill. 492 at 494, 46 N. E. 2d 1011 at 1013:

> "The rule known as the 'scintilla of evidence rule,' applied in some jurisdictions,—that is, that if there is even a scintilla of evidence tending to support the plaintiff's case, the cause must be submitted to the jury,—is not followed in this State. The test of the existence of the right to have the cause submitted to the jury, as recognized in this State, is whether there is evidence in the record which, with all its reasonable inferences, taken in the aspect most favorable to the contestant, may be said to be sufficient in law to support the cause of action. *Lewis* v. *Deamude*, 376 Ill. 219; *Burns* v. *City of Chicago*, 338 id. 89; *Bailey* v. *Oberlander*, 329 id. 568."

Under the facts considered in its opinion, which the plaintiffs state are sufficient, the Court of Appeals did not misapprehend or refuse to follow the applicable law of Illinois.

III.

The Plaintiffs Were Not Deprived of Their Verdicts by Judicial Fiat.

The assumption in the second of the questions presented by the plaintiffs that they were deprived of their verdicts by judicial fiat is wholly without merit. As pointed out by the Court of Appeals, the Trial Court, in his bench opinion, stated:

> "I have weighed it very heavily since the trial, trying to find some escape from my own deep conviction that no fair and reasonably minded person could say that this gross, inexcusable negligence of a trained, experienced vehicle driver could be found either not negligence under the circumstances, or that such negligence was not a proximate cause of the injury for which the plaintiff seeks recovery." (App. 145.)

The Trial Court went on to say:

> "It would be pleasanter to rule otherwise, and easier by far, but whatever anyone else may think of it, I am bound to speak my honest judgment, and that is it."

From these statements of the trial court it could hardly be said that the plaintiffs were deprived of their judgments by judicial fiat. The Court of Appeals examined the record and came to the same conclusion as did the trial court. Thus both the trial court and the Court of Appeals are in agreement that the plaintiffs were guilty of contributory negligence as a matter of law, and that they failed to adduce any evidence tending to prove negligence on the part of the defendants. And in so doing they followed the law of Illinois. As was said in *Poulson* v. *Poulson*, 1 Ill. App. 2d 201, 117 N. E. 2d 310, at page 205:

> "A trial judge after an analysis of the evidence in the case, would be derelict in his duty in not directing a verdict under like circumstances, and inasmuch as the same rules are applicable to a motion for judgment notwithstanding the verdict, as in the case of a motion directing a verdict, it cannot be said that the trial court was in error in entering a judgment notwithstanding the verdict in favor of the defendant."

See also *Wheat* v. *Baltimore & Ohio Ry. Co.*, 7th Cir., 262 F. 2d 289, a case, as here, in which the plaintiffs failed to prove the exercise of ordinary care on their own part or negligence on the part of the defendant, at page 295:

CONCLUSION.

In conclusion it is respectfully submitted that the judgment of the Court of Appeals is clearly correct. The decision involves no important or novel question of law. No federal question is involved. The issues are controlled by local law. The petitioners have failed to show that the local law has been misapplied. They have simply, as both the District Court and the Court of Appeals have found, failed to adduce to any evidence tending to prove their case.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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